

ESTATE OF LOUISE AMIOTTE LAJTAY

IBIA 84-5

Decided April 30, 1984

Appeal from a September 22, 1983, order denying reopening issued by Administrative Law Judge Elmer T. Nitzschke in IP BI 468C 79, IP BI 199B 83.

Affirmed.

1. Administrative Procedure: Burden of Proof--Indian Probate:
Reopening: Generally

Under the provisions of 43 CFR 4.242(h), the burden of proving entitlement to reopening in Indian probate proceedings lies with the petitioner.

APPEARANCES: Ramon A. Roubideaux, Esq., Rapid City, South Dakota, for appellant; E.W. Hollstein, Esq., Rushville, Nebraska, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On November 22, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Carol Freedle (appellant). Appellant seeks review of a September 22, 1983, order denying reopening issued by Administrative Law Judge Elmer T. Nitzschke in the estate of Louise Amiotte Lajtay (decendent). Appellant sought reopening in order to overturn a September 5, 1979, order approving decendent's will. For the reasons discussed below, the Board affirms the order denying reopening.

Background

Decendent, unallotted Oglala Sioux U-9037, died on February 2, 1979, at the age of 60 years. A hearing to probate her Indian trust estate was held on August 7, 1979. At the hearing, evidence showed that decendent's heirs at law were her non-Indian husband, Joe Lajtay (appellee); her daughter, appellant here; and her son, Elbert Wayne Exendine. ^{1/} A letter dated September 23, 1978, which purported to be decendent's last will and testament was introduced by her mother, Louisa Amiotte, and her sister, Darlene McLaughlin, who had assisted decendent in preparing the document and had witnessed it. Both of the witnesses appeared at the hearing and testified as to decendent's testamentary capacity and intent. The letter was found to be a proper testamentary document, and distribution of decendent's estate was ordered under its terms. Accordingly, appellant received \$1,000; her brother received \$100; and the

^{1/} Elbert Exendine is not a party to this appeal.

remainder of decedent's estate, consisting primarily of 1,115 acres of Indian trust land on the Pine Ridge Indian Reservation in South Dakota, passed to her husband.

Because the Department has no authority to hold land in trust for non-Indians, 2/ on March 19, 1980, fee patents to decedent's 1,115 acres of land were issued to appellee.

Appellant filed a petition to reopen the estate on December 22, 1982, alleging that the will was a forgery. A hearing on reopening was held on June 28, 1983. Reopening was denied on September 22, 1983.

Appellant sought review of this decision by the Board. Both parties have filed briefs on appeal.

Discussion and Conclusions

In order to reopen an Indian estate that has been closed for more than 3 years, the requirements of 43 CFR 4.242(h) must be met:

If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

In the order denying reopening, the Judge found at page 2 that "Carol Freedle did not receive the notice of hearing mailed to her at an incorrect address in Denver, Colorado, nor did she receive the notice sent to her in care of her aunt Darlene McLaughlin." Although finding that appellant did not receive actual notice of the hearing, the Judge concluded:

1. The petitioner has not established that she did not have an actual knowledge of the hearing of August 7, 1979.
2. The petitioner has failed to show that she was not on the reservation or otherwise in the vicinity at any time while the public notices of the August 7, 1979 hearing were posted.

Order at 2.

[1] Under section 4.242(h), the burden is on the petitioner to prove each of the four requirements for reopening. Estate of Edwin (Edward) J. Scarborough, 11 IBIA 179 (1983). This burden does not shift after a preliminary showing by the petitioner. Appellant proved that she did not receive actual notice of the original hearing. She failed, however, to show that she did not receive constructive notice through being on the reservation or in the vicinity while public notices of the hearing were posted. Appellant

2/ See, e.g., Estate of Dana A. Knight, 9 IBIA 82, 88 I.D. 987 (1981), and cases cited therein.

states that she visited her grandmother on the reservation sometime in either July or August 1979. Although it is possible that appellant was not on the reservation until after the hearing, she has failed to prove that she was not. The Board therefore affirms the order denying reopening based on appellant's failure to prove lack of constructive notice.

Appellant argues that the Judge erroneously relied on an "actual knowledge" standard in denying her petition. However, the Judge did not conclude only that appellant had failed to show lack of actual knowledge, but also that she had failed to show lack of constructive notice. The Judge correctly placed the full burden of proving her entitlement to reopening on appellant. Reopening was properly denied when she failed to carry this burden of proof. 3/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 22, 1983, order denying reopening of this estate is affirmed.

Bernard V. Parrette
Chief Administrative Judge

We concur:

Jerry Muskrat
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

3/ Because of this disposition of the appeal, the Board does not reach the remaining issues raised by appellant.